Supreme Court, U.S.
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No. 91-1501

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

POMINI FARREL S.p.A. and POMINI, INC.,

Petitioners,

v.

FARREL CORPORATION and
UNITED STATES INTERNATIONAL
TRADE COMMISSION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the United States International Trade Commission has authority to terminate an on-going investigation under section 337 of the Tariff Act of 1930, where underlying claims have been ordered to arbitration under a contractual arbitration clause, notwithstanding the statute's clear directives that the Commission shall deal with any violations "in addition to any other provision of law," and that, with two specific but inapplicable exceptions, it "shall determine, with respect to each investigation conducted by it . . . whether or not there is a violation of this section."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A23) is reported at 949 F.2d 1147. The opinion of the

United States International Trade Commission (Pet. App. A24-A60) is reported at USITC Pub. 2414 (Aug. 1991).

JURISDICTION

The judgment of the court of appeals was entered on November 22, 1991. A timely petition for rehearing was denied on January 23, 1992. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1988).

STATEMENT

Beginning in 1957 and ending in 1985, respondent Farrel Corporation and petitioner Pomini Farrel S.p.A. (and their respective predecessors) operated under licensing agreements whereby Pomini was authorized to manufacture heavy mixing machines following designs set forth in Farrel drawings and utilizing patented technology, and to sell them in territories specified in the licensing agreements. As of January 1, 1986, in accordance with the licensing agreements, Farrel terminated all of Pomini's rights to use or retain any Farrel technology.

In response to Pomini's continued use of Farrel technology in violation of the licensing agreement, including the sale of offending products throughout the world, and including the United States where no rights under the license had ever existed,[1] Farrel brought legal actions in Italy, Great Britain, and the United States. In

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[1] Shortly after the termination of the license agreement, Pomini announced plans to service the United States market through a newly-formed entity, Pomini, Inc., and did in fact proceed to sell products in the United States using misappropriated Farrel technology.

August 1990, based on a complaint filed by Farrel, the United States International Trade Commission ordered the institution of an investigation pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, to determine whether Pomini's importation of mixing devices amounted to a violation of section 337(a)(1)(A), the threat or effect of which was to destroy or substantially injure an industry in the United States. 19 U.S.C. § 1337(a)(1)(A).

Upon objection raised by Pomini in a motion for summary determination, the Administrative Law Judge terminated and the Commission subsequently affirmed termination of its investigation on the ground that underlying claims were the subject of an arbitration clause contained in the licensing agreements and had in fact been ordered to arbitration by the United States District Court for the Northern District of Ohio. Pet. App. A26-A55. Commissioner Rohr dissented, stating in part that "the Commission does not have the authority to suspend or terminate this investigation." Pet. App. A56.

Following termination of the ITC investigation, the parties submitted the underlying dispute to arbitration before the International Chamber of Commerce in Geneva. That proceeding has gone forward, and, as this opposition was prepared, evidence and argument were to be heard beginning April 10, 1992. Petition at 11. While no precise date can be established for final resolution of that matter, it is likely that a decision will be rendered in the relatively near future.

On appeal by Farrel of the decision of the ITC terminating the Commission investigation, the United States Court of Appeals for the Federal Circuit reversed.

Based on a detailed reading of the language of the ITC's organic statute, it concluded that the statute did not, in fact, confer upon the Commission the discretionary authority to dismiss its own investigation in deference to an arbitration clause. *See* discussion at 9-12, *infra*. Following the panel's denial of the petition for rehearing, the full court, with two judges dissenting, denied Pomini's suggestion for rehearing in banc. Pet. App. A107-108.

ARGUMENT

According to petitioners, this case presents the question whether agreements to arbitrate are enforceable in matters pending before the International Trade Commission. They further contend that the decision below "defies" this Court's rulings in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), and *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974). Petition at 13. Both of these assertions are false. In fact, the decision of the United States Court of Appeals for the Federal Circuit presents no issue of the enforceability of a compulsory arbitration clause,[2] and this Court's precedents dealing with that subject are not at issue.

The only question ever raised in this case is whether the ITC has authority to terminate an on-going investigation because of the existence of an arbitration

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[2] Well before the decision in this case by the Federal Circuit, the parties had in fact commenced arbitration proceedings which are now near completion. Of course, the ITC, and thus an appellate court reviewing its decision, is without jurisdiction to order enforcement of an arbitration clause. In any event, at the time of the Federal Circuit decision there remained no dispute about whether arbitration would go forward.

clause or because an arbitration concerning the same issue is going forward.[3] The Federal Circuit decision that it does not have such power is correct. Even if its validity were in doubt, such an isolated question peculiar to a single government agency would not merit review by this Court.

Petitioners thus mischaracterize the decision when they state that it "effectively engrafts onto every arbitration clause governing international commercial transactions an exception for Section 337 proceedings, regardless of the bargain struck by the parties." Petition at 13. In fact, the decision of the Federal Circuit simply does not address the issue whether claims may be ordered to compulsory

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[3] There is nothing incongruous or incompatible about having an ITC section 337 investigation go forward at the same time that an arbitration proceeds concerning some or all of the underlying issues. Indeed, concurrent proceedings appear to be explicitly contemplated by the ITC statute (section 337 violations are to be dealt with as provided therein "in addition to any other provision of law," 19 U.S.C. § 1337(a)(1)), and concurrent ITC and district court proceedings have been explicitly approved. *E.g., Diversified Prods. Corp. v. Weslo Design Int'l, Inc. (In re Convertible Rowing Exerciser Patent Litig.)*, 616 F.Supp. 1134 (D. Del. 1985).

Moreover, the statutory mission of the ITC -- to identify unfair competition in international trade and expeditiously fashion a remedy designed to protect United States domestic industry -- is distinctly different than the contractual assignment of an arbitral panel, which simply sits to resolve the dispute presented by the parties. While it is possible that an arbitration will produce some of the remedies which the ITC might order, other remedies -- such as exclusion, 19 U.S.C. § 1337(d) -- can be ordered only by the Commission. And the statutory constraint on the ITC to proceed quickly to provide relief from any existing unfair practices is, of course, wholly lacking in an arbitration. 19 U.S.C. § 1337(b)(1).

arbitration where they also underlie an on-going unfair trade practice investigation before the ITC. Moreover, the possibility of such concurrent proceedings is wholly consistent with this Court's decisions as they touch on the interaction of arbitration clauses with activities taking place in other fora. Those cases make clear that, while an enforceable arbitration clause will generally result in a stay of any parallel judicial action, no such result follows from the language of the Federal Arbitration Act where the parallel proceeding is before an administrative agency.

In *Mitsubishi* and *Scherk*, the Court was presented with disputes under the antitrust and securities laws, respectively, where parties sought enforcement of an arbitration clause in the context of pending lawsuits brought to litigate the underlying substantive claims. Relying in both cases on the provisions of the Federal Arbitration Act, 9 U.S.C. § 2, establishing the enforceability of agreements to arbitrate in contracts involving commerce -- which the Court found to be of special importance in the context of international agreements, *Mitsubishi*, 473 U.S. at 625; *Scherk*, 417 U.S at 511 -- this Court ordered that arbitration of the matters in dispute go forward.

The language of section 3 of the Arbitration Act further directs that a court presented with a lawsuit whose subject matter is arbitrable shall stay the proceedings in the case in order to allow the arbitration to go forward.[4]

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[4] Section 3 of the Arbitration Act, 9 U.S.C. § 3 (1988), provides, in relevant part, that:

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In light of this provision, the Court in both *Mitsubishi* and *Scherk* treated the arbitration clause before it as requiring not only that arbitration be allowed to go forward but that the court action be brought to a halt. 473 U.S. at 628; 417 U.S. at 519.

The language of section 3 of the Arbitration Act does not on its face command that such parallel proceedings before an administrative agency be stayed. This is hardly surprising, since agencies, unlike courts, are not mere neutrals but rather bring to the issues before them a substantive agenda of statutory responsibilities. It would be odd, indeed, if private regulated parties could, as a general matter, waive the jurisdiction of the agencies charged with regulating their conduct. *See A/S Ivarans Rederi v. U.S.*, 895 F.2d 1441, 1445 (D.C. Cir. 1990); *Duke Power Co. v. FERC*, 864 F.2d 823, 829 (D.C. Cir. 1989); *Gulf Oil Corp. v. Federal Power Commission*, 563 F.2d 588, 596 (3d Cir. 1977).[5]

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> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending . . . shall on application of one of the parties stay the trial of the action until such arbitration has been had . . . .

[5] Under this Court's decision in *Mitsubishi*, administrative agency actions would not necessarily be terminated by virtue of a contractual arbitration clause, even apart from the language of Section 3 of the Arbitration Act limiting its application to the staying of judicial proceedings. For the Court there acknowledged that the contractual intent of the parties to arbitrate may be overridden in its entirety by a "congressional intention expressed in some other statute" to the effect that particular types of matters ought not to be subject to arbitration.

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Just last Term, this Court confronted the precise question of the application of arbitration clauses to matters with which an administrative agency may have a statutory concern. In *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S.Ct. 1647 (1991), the Court was faced with the issue of whether arbitration clauses will be enforced with regard to claims under the Age Discrimination in Employment Act. The Court answered that question in the affirmative, but justified its conclusion in part on the ground that such enforcement of arbitration clauses would not "undermine the role of the EEOC in enforcing the ADEA." *Id.* at 1653.

Specifically, the Court noted that "an individual ADEA claimant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action." 111 S.Ct. at 1653. Moreover, the Court noted, the EEOC is free to receive information from any source and has independent authority to investigate age discrimination and pursue litigation, and may use whatever information is developed as a basis for itself seeking class-wide or equitable relief. *Id.* at 1653, 1655. Thus, in *Gilmer*, the Court found ADEA claims to be arbitrable in part *because* arbitration would not foreclose administrative agency action with regard to the same claim.

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Mitsubishi, 473 U.S. at 627. If such a congressional intention can entirely defeat the parties' intentions under an arbitration clause, clearly there can also be a governing expression of congressional intention not to foreclose arbitration, but simply to allow existing administrative processes to run their course. *See Gilmer v. Interstate/Johnson Lane Corp.*, 111 S.Ct. 1647, 1654 (1991).

In light of that conclusion, the decision below requiring the ITC investigation to proceed is in no way dispositive as to the enforceability of a clause calling for arbitration of the same issues. Accordingly, the first question said to be presented by the Petition is in fact not before the Court.[6]

The second issue offered by petitioner is whether the ITC has authority to terminate a section 337 proceeding, once commenced, short of a determination on the merits, because of an existing contract to arbitrate the underlying dispute. This is, in fact, the issue addressed by the Federal Circuit in its decision. It has no bearing whatsoever on the duty or authority of any other agency in a parallel situation. Moreover, the Federal Circuit's conclusion that (with two explicit statutory exceptions) the ITC is without such discretion rests on a careful parsing of the words of various interrelated provisions of the ITC's organic statute. It is both correct and of insufficient importance to merit review by this Court.

The Federal Circuit noted that the Commission, by statute, is given exclusive authority to investigate allegations that foreign importers are engaging in "unfair methods of competition," and also is required to follow established procedures and strict timetables for the

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[6] The issue of arbitrability of disputes also pending before the ITC can arise not only in the Federal Circuit, but in any circuit where an action to compel arbitration may be brought. *See* 9 U.S.C. § 4 (1988). Thus, should it ever become a recurring issue of significant importance, the need for review by this Court may be manifested by a split in the circuits.

completion of investigations.[7] Pet. App. A10. In pursuing those investigations, it observed, Pet. App. A11, the ITC is obligated to

> consider factors that may or may not interest the parties: the "public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers." 19 U.S.C. § 1337(c)

The court relied for its ruling principally on the mandatory language of 19 U.S.C. § 1337(c). That section requires that the Commission "*shall determine*, with respect to each investigation conducted by it under this section, *whether or not there is a violation*," except that it states that the Commission may terminate without such a determination by issuing a consent order or on the basis of a settlement agreement. Pet. App. A12 (emphasis as in decision below). The court ruled that it would be contrary to traditional canons of statutory interpretation to create an exception in addition to those specified by Congress.[8]

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[7] The Commission is required, under 19 U.S.C. § 1337(b)(1), to "conclude any such investigation, and make its determination under this section, at the earliest practicable time, but not later than one year (18 months in more complicated cases) after the date of publication of notice of such investigation." Pet. App. A112.

[8] The court also held that any such additional exception would be contrary to those already specified by Congress, since in the instances of consent order or settlement, the Commission exercises discretion to terminate or not only after reviewing the resolution proposed by the parties. No such review of the final resolution would be possible under a judicially created exception to section 1337(b)(1) for contractual arbitration agreements. Pet. App. A12.

Pet. App. A13-A14. The court specifically declined to decide whether the Commission may refuse to initiate an investigation -- as opposed to pursue to a determination one already initiated -- on the basis of an existing arbitration agreement between the parties. Pet. App. A13 n. 6.

The court then turned to the contention that the Commission must be able to terminate out of deference to an arbitration agreement because of the provision of section 337(c) that "[a]ll legal and equitable defenses may be presented in all cases." Pet. App. A14. The court rejected the Commission's assertion that this language was intended to further qualify its obligation to determine whether a violation exists. Relying on both the text and the legislative history of the provision, the court rather read it as an assurance that the Commission would consider all such defenses in the determination of substantive violations under the statute.[9]

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[9] The court noted first that no language relating to the "all defenses" provision permits termination of an investigation without first determining whether a violation exists. Pet. App. A15. (It is noteworthy that the "all defenses" language was not inserted as a qualification of the duty to determine whether there is a violation, but rather two sentences later, as a free standing provision. Pet. App. A114.) The court then discussed at some length the legislative history of the 1974 amendment of the statute adding the "all defenses" language, which indicated that the concern was to allow opportunity to raise defenses on the merits to the assertion of a violation, and to assure a "full due process hearing" before the Commission makes a determination. Pet. App. A15-A16.

The court also rejected the claim that its conclusion was somehow inconsistent with its own holding in *Young Eng'rs Inc. v. United States*

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Finally, the Federal Circuit examined the ITC's stated reliance on the broad federal policy favoring arbitration, especially in international transactions, as the ground for terminating its investigation. Pet. App. A17-A22. The court noted the language of section 337(a) commanding that violations, "when found by the Commission to exist shall be dealt with, *in addition to any other provision of law*," Pet. App. A19 (emphasis as in decision below), and found it to evince a clear intent that section 337's protections and procedures cannot be waived by an arbitration agreement. Citing the parallel situation in the *Gilmer* case where enforcement of an arbitration clause did not render inapplicable remedies for the same conduct otherwise available through the EEOC, the court reasoned that the policy favoring arbitration did not provide any basis to terminate the ITC investigation contrary to the terms of the statute. Pet. App. A20-22.

By its thorough analysis of the specific language of section 337, the Federal Circuit has thus correctly ruled that the Commission lacked discretion to terminate its investigation in this case on the ground that the parties had agreed to arbitrate the underlying issues. Even if that were in doubt, review by this Court would be inappropriate. The narrow question of ITC termination authority, standing alone, where Congress is fully capable

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[9](...continued from previous page)
International Trade Comm'n, 721 F.2d 1305 (Fed. Cir. 1983), that the ITC could properly consider the *res judicata* effect of a judicial determination. The court noted that the *Young Eng'rs* holding did not excuse the ITC from reaching a final determination on the existence of violations. Pet. App. A17.

of altering the conclusion reached by the Federal Circuit, does not merit this Court's attention.[10]

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

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[10] Even if that issue could ever justify plenary review, it would not be now, after its first resolution at the appellate level. There is, of course, no inter-circuit conflict, nor can there be, since appeals of ITC decisions are all directed to the Federal Circuit. 19 U.S.C. § 1337(c); 28 U.S.C. § 1295(a)(6) (1988). To the extent that the issue has any continuing importance, however, it will be presented again to that court, where it may be illuminated by further analysis.